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5 UNITED STATES DISTRICT COURT
6 DISTRICT OF NEVADA
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8 CHARLES MANLEY,

9 *Petitioner,*

10 vs.

11 TIMOTHY FILSON, *et al.*,

12 *Respondents.*
13

3:15-cv-00083-LRH-WGC

ORDER

14 This habeas matter under 28 U.S.C. § 2254 comes before the Court on, *inter alia*, a show-cause
15 inquiry as to whether the petition is subject to dismissal as time-barred under 28 U.S.C. § 2244(d).

16 ***Background***

17 Petitioner Charles Manley challenges his adjudication and sentencing as a habitual criminal on
18 his Nevada state conviction, pursuant to a guilty plea, of burglary while in possession of a firearm.

19 A judgment of conviction was filed on December 27, 2004, in No. C204662 in the state district
20 court. (ECF No. 18-5; Exhibit 4.) No amended or corrected judgments of conviction were filed in the
21 case thereafter.¹

22 Petitioner did not file a direct appeal, and the time to do so expired on January 26, 2005.

23 Petitioner filed no state proceedings seeking post-conviction or other collateral review within
24 a year of January 26, 2005. To the extent that petitioner relies upon state proceedings filed years
25 thereafter as rendering his federal petition timely, the Court discusses those proceedings *infra*.
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27 ¹In addition to the materials on file, the Court takes judicial notice of the online docket records of the state
28 district court. *E.g.*, *Harris v. County of Orange*, 682 F.3d 1126, 1131-32 (9th Cir. 2012). The online docket record
may be accessed from: <https://www.clarkcountycourts.us/Anonymous/default.aspx>

1 The federal petition in this matter was dispatched for filing approximately a decade later, on or
2 after January 25, 2015.

3 In the single ground presented in the federal petition, Manley alleges that he was denied due
4 process in violation of the Fifth and Fourteenth Amendments because he allegedly was improperly
5 adjudicated and sentenced as a habitual criminal due to alleged circumstances and deficiencies existing
6 as of the date of the September 30, 2004, sentencing proceeding. (See ECF No. 7, at 4-6.)²

7 *Discussion*

8 *Base Calculation of the Federal Limitation Period*

9 Under 28 U.S.C. § 2244(d)(1)(A), the federal one-year limitation period, unless otherwise tolled
10 or subject to delayed accrual, begins running after "the date on which the judgment became final by the
11 conclusion of direct review or the expiration of the time for seeking such direct review."

12 In the present case, the judgment of conviction was filed on December 27, 2004; and the time
13 period to appeal the judgment expired on January 26, 2005. The federal one-year limitation period
14 therefore expired one year later on January 26, 2006, absent a basis for tolling or delayed accrual. No
15 state proceedings for post-conviction or other collateral review were filed prior to that date that would
16 give rise to statutory tolling under 28 U.S.C. § 2244(d)(2). The federal petition was not constructively
17 filed until on or about January 25, 2015, nine years after the federal limitation period putatively had
18 expired. The federal petition therefore is untimely on its face, absent tolling or delayed accrual.

19 *Alleged Alternative Accrual Date*

20 Petitioner urges, however, that the federal one-year limitation period did not begin to run under
21 § 2244(d)(1)(A) until after the October 22, 2014, issuance of the remittitur concluding appellate
22 proceedings on a motion to modify sentence that he filed on November 21, 2013. (ECF Nos. 18-17
23 through 18-25, Exhibits 16-24; ECF No. 10, at 7.) Petitioner maintains that he can file a motion to
24 modify sentence at any time under state law and that such a motion constitutes a "direct attack" of a
25 conviction for purposes of § 2244(d)(1)(A) rather than a proceeding for collateral review.

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27 ²The initial page citations herein are to the page number in the electronic header generated by CM/ECF rather
28 than to any internal page numbering in the original document. A parallel cite to certain state court record exhibits is
provided for the *pro se* petitioner's reference.

1 Petitioner is incorrect. Petitioner’s December 27, 2004, judgment of conviction became final
2 by the expiration of the time for seeking direct review when the time to file a direct appeal expired on
3 January 26, 2005. The federal limitation period began running under § 2244(d)(1)(A) after that date;
4 and absent a basis for tolling during the ensuing year, expired one year later on January 26, 2006. *E.g.*,
5 *Randle v. Crawford*, 604 F.3d 1047, 1050 & 1054-57 (9th Cir. 2009). The filing of a motion to modify
6 sentence years after the time for seeking direct review already had expired as to the judgment is
7 irrelevant, as is whether the state court motion was timely under state procedural law.

8 The two Ninth Circuit decisions relied upon by petitioner do not establish to the contrary.

9 In *Collier v. Bayer*, 408 F.3d 1279 (9th Cir. 2005), the Court of Appeals made no holding
10 regarding the application of the federal limitation period in 28 U.S.C. § 2244(d). *Collier* instead
11 concerned application of the procedural default doctrine based upon the Nevada state courts’ application
12 of the state procedural bar in N.R.S. 34.726(1), which establishes a one-year state limitations period for
13 a timely state post-conviction petition.

14 *Collier* held, *inter alia*, that a state law rule that a motion to correct illegal sentence did not
15 constitute a tolling “appeal . . . from the judgment” under N.R.S. 34.726(1) did not constitute a clearly
16 established state law rule at the relevant time for purposes of the federal procedural default doctrine.
17 The panel held that the rule was not clearly established at the relevant time because a state supreme
18 court decision holding that the tolling provisions of N.R.S. 34.726(1) applied only to a timely direct
19 appeal was not decided until 1998, after *Collier* had filed his motion in 1997. *See* 408 F.3d at 1286-88.
20 Even if this holding had any relevance to the application of the accrual rule in § 2244(d)(1)(A), it cannot
21 benefit Manley. He filed his motion to modify sentence in 2013, fifteen years after the Supreme Court
22 of Nevada clearly had held that only a timely direct appeal could constitute an “appeal . . . from the
23 judgment” under N.R.S. 34.726(1). As *Collier* notes, after the state supreme court’s 1998 holding, “the
24 confusion present during *Collier*’s appeal does not exist.” 408 F.3d at 1288. This holding in *Collier*
25 thus clearly cannot benefit Manley.

26 Petitioner further relies upon a footnote in *Collier* referring to state court authority suggesting
27 that “[m]otions to correct an illegal sentence . . . are not collateral attacks” under Nevada state law. 408
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1 F.3d at 1282 n.2.³ In the cited state case, the state supreme court stated that motions to modify sentence
2 “are direct attacks on the decision itself, rather than collateral, post-conviction attacks” for purposes of
3 determining whether a particular state statute authorized an appeal from an order denying such a motion.
4 *See Passanisi v. State*, 108 Nev. 318, 831 P.2d 1371, 1372-73 (1992), *overruled on related grounds by*,
5 *Harris v. State*, 329 P.3d 619, 627 (Nev. 2014).

6 State court characterizations of a proceeding as a “direct attack” or “collateral attack” for
7 purposes of particular consequences under various state procedural rules are not necessarily
8 determinative of whether the proceeding constitutes “direct review” for purposes of § 2244(d)(1)(A),
9 which is a question of federal law. State law was material to the outcome in *Collier* because application
10 of the procedural default doctrine turned upon whether the state law procedural rule was clearly
11 established and thus adequate. *See generally Collier*, 408 F.3d at 1283-84. In contrast, nothing in
12 *Collier* establishes that a motion to modify sentence filed years after the expiration of the time to file
13 a direct appeal constitutes “direct review” for purposes of § 2244(d)(1)(A). *Cf. Randle*, 604 F.3d at
14 1054-55 (declining to construe an untimely appeal as a continuation of direct review under
15 § 2244(d)(1)(A) because such a construction would allow manipulation of the date of finality of
16 judgment indefinitely and essentially would eviscerate the federal statute of limitations).

17 *Collier* thus does not support petitioner’s position that a motion to modify sentence constitutes
18 direct review with regard to finality of judgment for purposes of § 2244(d)(1)(A).

19 Petitioner further relies upon *Summers v. Schriro*, 481 F.3d 710 (9th Cir. 2007). In *Summers*,
20 under Arizona law, a defendant who pled guilty waived her right to a conventional direct appeal but
21 retained the right to seek review of the conviction in an “of-right proceeding” under a state criminal
22 procedure rule. Under Arizona case law, such a proceeding constituted “the functional equivalent of
23 a direct appeal.” 481 F.3d at 713 (internal quotation marks and citation omitted). The Ninth Circuit
24 accordingly held that the of-right proceeding – which took the place of a direct appeal opportunity that
25 the defendant otherwise did not have – constituted “direct review” for purposes of § 2244(d)(1)(A).

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27 ³Petitioner cites in error to the note being at page 1300, perhaps referring to an online copy of the decision
28 where the footnotes all are set forth at the end of the document. Page 1300 is at the end of the dissent, not the majority
opinion; and the page has no footnotes.

1 In contrast, no Nevada case has held that a motion to modify sentence is the functional equivalent
2 specifically of a direct appeal, and the motion does not take the place of a direct appeal opportunity that
3 the defendant otherwise does not have.⁴ In the present case, for example, Manley could have pursued
4 a direct appeal, but he did not. Accordingly, nothing in *Summers* establishes that a Nevada motion to
5 modify sentence filed years after the expiration of the time to file a direct appeal constitutes “direct
6 review” for purposes of § 2244(d)(1)(A). *Summers* simply is inapposite.

7 Petitioner presents no further argument seeking to establish a basis for either tolling or delayed
8 accrual.

9 The federal petition therefore is untimely by nine years.

10 ***Alleged Actual Innocence of the Habitual Criminal Adjudication***

11 Petitioner seeks in the alternative to overcome the untimeliness of the petition on the basis of
12 actual innocence of the habitual criminal adjudication and sentence.

13 Petitioner maintains that he is actually innocent of the habitual criminal adjudication and
14 sentence because “the Court erroneously believed that his criminal record was so heavy that the Judge
15 would ‘break a toe’ if he dropped [sic] it on his foot.” (ECF No. 10, at 4-5; see also ECF No. 7, at 4.)
16 He asserts that “the issue is what the Judge would have done had it known that at least four of the prior
17 convictions it relied on were improper.” (ECF No. 10, at 4-5; see also ECF No. 7 at 4.) He challenges
18 a number of the prior convictions on specific grounds discussed further *infra*.

19 Generally, in order to avoid application of the one-year limitation period based upon a claim of
20 actual innocence, a petitioner must come forward with new reliable evidence tending to establish actual
21 factual innocence, *i.e.*, tending to establish that no reasonable trier of fact would have found him guilty
22 beyond a reasonable doubt. See *McQuiggin v. Perkins*, 133 S.Ct. 1924 (2013); *House v. Bell*, 547 U.S.
23 518 (2006); *Bousley v. United States*, 523 U.S. 614 (1998); *Lee v. Lampert*, 653 F.3d 929 (9th Cir.
24 2011)(*en banc*). In this regard, “‘actual innocence’ means factual innocence, not mere legal
25 insufficiency.” *Bousley*, 523 U.S. at 623.

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28 ⁴Moreover, as discussed above with regard to *Collier*, the state supreme court held in 1998 that a motion to
correct an illegal sentence was not an appeal for purposes of tolling of the state limitations period.

1 Assuming *arguendo* that a petitioner may overcome the untimeliness of a petition by showing
2 actual innocence of a noncapital sentencing enhancement, petitioner has failed to come forward with
3 new reliable evidence tending to demonstrate actual factual innocence of the habitual criminal
4 adjudication.

5 Petitioner was adjudicated and sentenced as a habitual criminal, pursuant to the guilty plea
6 agreement, under Nevada's "large" habitual criminal statute, N.R.S. 207.010(1)(b). (See ECF Nos. 18-3
7 & 18-5; Exhibits 2 and 4.)

8 At the time of petitioner's August 20, 2004, offense, the statute in pertinent part authorized
9 "large" habitual criminal treatment for a person convicted of a felony in Nevada "who has previously
10 been three times convicted, whether in this State or elsewhere, of any crime which under the laws of
11 the situs of the crime or of this State would amount to a felony." N.R.S. 207.010(1)(b), as amended
12 through 1997 Laws, c. 314, § 8, at 1184.

13 Accordingly, in order to establish *arguendo* actual factual innocence of the habitual criminal
14 adjudication, Manley would have to present new reliable evidence establishing that he in fact has not
15 "been three times convicted, whether in this State or elsewhere, of any crime which under the laws of
16 the situs of the crime or of this State would amount to a felony."

17 In a written guilty plea agreement executed on September 30, 2004, Manley agreed to plead
18 guilty to "COUNT – BURGLARY WHILE IN POSSESSION OF A FIREARM (Large Habitual), as
19 more fully alleged in the charging document" The charging document included a list setting forth
20 eight prior convictions. The written plea agreement further stated that "[b]oth the State and Defendant
21 stipulate and agree that Defendant should receive a sentenced [sic] of TEN (10) to LIFE under the "large
22 habitual sentencing enhancements, NRS 207.0101(b)." (ECF No. 18-2; Exhibit 1. ECF No. 18-3;
23 Exhibit 2.)

24 During the September 30, 2004, plea colloquy, Manley acknowledged that he had read and
25 signed the plea agreement. Defense counsel stated that the plea agreement was being filed in open
26 court, and the agreement carries a file stamp reflecting that it was filed in open court. Defense counsel
27 further stated that the State and the defendant had stipulated to a ten to life sentence under the large
28 habitual sentencing guidelines. (ECF No. 18-3, Exhibit 2. ECF No. 18-4, at 3-4; Exhibit 3, at 2-3.)

1 During the proceeding, the prosecutor stated: "I'd like to file some certified judgements [sic]
2 of conviction." The state district court replied: "Go ahead" and "I'm familiar with his record." The
3 court thereupon continued speaking about petitioner's record. (ECF No. 18-4, at 5; Exhibit 3, at 4.)

4 On federal habeas review, this Court directed respondents to file copies of the prior judgments
5 of conviction filed at petitioner's sentencing. (ECF No. 20.)

6 Petitioner thereafter questioned the authenticity of the materials filed by respondents (ECF No.
7 24-1) and raised questions about the accompanying state court clerk's office form filed with the
8 supplemental exhibit. (See ECF No. 25.)

9 This Court thereupon directed respondents to file certified copies of the judgments of conviction
10 filed at the September 30, 2004, sentencing along with affidavits or declarations responding to the
11 points raised by petitioner. (ECF No. 26.)

12 The declarations submitted in response collectively reflect that: (1) the court clerk assigned to
13 the matter on September 30, 2004, stamped the guilty plea agreement "filed in open court" at that time;
14 (2) no exhibits were received and filed at the September 30, 2004, hearing; (3) a different court clerk
15 at later June 15, 2009, and July 8, 2009, proceedings regarding petitioner's requests for the prior
16 judgments of conviction searched the then hard copy file and did not find them for the June 15, 2009,
17 proceeding, leading to the matter being continued; (4) at the later July 8, 2009, followup hearing, the
18 court noted that it had received certified judgments of conviction and mailed them to petitioner; (5) the
19 court clerk "do[es] not know where they came from;" (6) the court directed her at that time to file them
20 as an exhibit "on that day;" (7) while the exhibit description in the vault exhibit form perhaps should
21 have referred to the petitioner's then-current proceedings, the court clerk referred on the form to the date
22 of the "hearing of the sentencing instead because I was relating them to the hearing date the defendant
23 requested;" (8) during the second court clerk's research, the court clerk from the September 30, 2004,
24 sentencing informed her that the parties used the same presentence investigation report and the same
25 prior judgments of conviction that had been used in petitioner's case in No. C197525; (9) the evidence
26 vault staff located previously lodged prior judgments of conviction for No. C197525 in the clerk's
27 evidence vault; and (10) respondents' counsel previously had filed the prior judgments of conviction
28 in this matter that had been provided to his staff in response to a request for the prior judgments of

1 conviction for this case, *i.e.*, No. C204662 in the state district court. (See ECF Nos. 29-1, 29-2, 29-4
2 & 30-1; Exhibits 26, 27, 29 & 30.)⁵

3 Respondents additionally filed a certified copy of the prior judgments of conviction provided
4 by the state court clerk. The Court notes that the certified copy stamps on the copies of the Nevada
5 convictions – which are in blue ink in the original exhibit filed manually in the federal record – are
6 electronic file-stamp dated variously on September 3, 2004, September 9, 2004, and September 22,
7 2004, on the front and/or the back of the papers. The copies of three Colorado convictions also carry
8 certified copy stamps by that court’s clerk that are electronic file-stamped dated on September 9, 2004,
9 with the different colored ink used in the stamps and signatures clearly reflected in the manually-filed
10 exhibit, which includes the raised seal of the local Nevada state district court clerk on its last page.
11 Those September dates would have been after the May 5, 2004, sentencing in No. C197525 but before
12 the September 30, 2004, sentencing in No. C204662. It thus would appear that the exhibit package on
13 file in this Court was prepared for No. C204662, not No. C197525, the court clerk’s assertion in the
14 recently-filed declarations notwithstanding. (See ECF No. 29-3; Exhibit 28, together with the
15 corresponding exhibit filed manually with ECF No. 27.)⁶

16 In his reply, petitioner declares that, *inter alia*, the written plea agreement was not filed in open
17 court, he never stipulated or admitted to the prior judgments of conviction “in open court,” and the prior
18 judgments of conviction filed in No. C197525 were not in fact used in No. C204662. (ECF No. 31.)

19 The pertinent issue at this juncture is not whether there was some procedural irregularity with
20 petitioner’s habitual criminal adjudication. That is, the pertinent issue is not, *inter alia*, whether the

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22 ⁵The online docket record for No. C197525 reflects that petitioner was sentenced in that matter on May 5,
23 2004, and that certified copies of prior judgments of conviction were provided and filed as an exhibit in connection with
adjudication of petitioner as a habitual criminal under the “small” Nevada habitual criminal statute.

24 ⁶In the electronically-filed copy of the exhibit, see, e.g., ECF No. 29-3, at 24, 43, 57 & 93. The certified copy
25 stamps are much clearer in the manually-filed original exhibit. The print date shown for the minutes for the last Nevada
26 judgment of conviction in the packet also is September 22, 2004. (See *id.*, at 101.) Additionally, the prior inmate
27 materials forwarded by the Colorado offenders records custodian similarly carry certification stamps from September 1,
28 2004. (See *id.*, at 3.) The only reasonable conclusion to draw from the exhibit, particularly the manually-filed original
exhibit, is that the packet was prepared for the September 30, 2004, sentencing in No. C204662, not the earlier May 5,
2004, proceeding in No. C197525. The prosecutor clearly referenced a packet of prior convictions at the September
30, 2004, proceeding that he then was prepared to file, but that packet for some reason apparently did not end up in the
record. (ECF No. 18-4, at 5; Exhibit 3, at 4.)

1 presiding judge made the appropriate findings, whether an exhibit with the prior judgments of
2 conviction was properly filed at the September 30, 2004, sentencing, or whether petitioner personally
3 admitted to the prior judgments of conviction “in open court” rather than in the written plea agreement.

4 The pertinent issue instead is whether petitioner has demonstrated that he is actually factually
5 innocent of the habitual criminal adjudication, *i.e.*, that he in fact was not previously three times
6 convicted of any crime that was a felony under either Nevada law or the laws of the situs of the crime.
7 Petitioner can overcome the untimeliness of the federal petition only upon a showing of actual factual
8 innocence. Showing instead some alleged procedural irregularity or other alleged legal insufficiency
9 in the habitual criminal adjudication proceedings does not establish such actual factual innocence of the
10 habitual criminal sentencing enhancement. To do that, again, petitioner must show that he in fact was
11 not previously three times convicted of any crime that was a felony under either Nevada law or the laws
12 of the situs of the crime.

13 Petitioner cannot make that required showing here, after having been given an opportunity to
14 reply to respondents’ filing and exhibits. The Court’s most recent order afforded the opportunity also
15 to present any additional arguments that he may have as to actual innocence. (ECF No. 26, at 3.)

16 Respondents present eight convictions from prior to the time of petitioner’s adjudication as a
17 habitual criminal in No. C204662, including four Colorado convictions and four Nevada convictions.

18 Respondents present, in particular, copies of the following convictions, which the Court lists
19 in chronological order:

- 20 (1) a conviction on or about July 12, 1990, for menacing, in
21 No. 89CR2445 in El Paso County, Colorado;
- 22 (2) a conviction on or about July 20, 1990, for giving false
23 information to a pawn broker, in No. 90CR24 in Fremont
24 County, Colorado;
- 25 (3) a conviction on or about September 14, 1992, for theft,
26 in No. 92CR583 in El Paso County, Colorado;
- 27 (4) a conviction on or about August 11, 1993, for theft, in
28 No. 91CR2789 in El Paso County, Colorado;

- 1 (5) a conviction on or about August 28, 1995, for possession
2 of a controlled substance, in No. C128842 in Clark
3 County, Nevada;
4 (6) a conviction on or about June 22, 1998, for possession of
5 a stolen vehicle, in No. C149044 in Clark County,
6 Nevada;
7 (7) a conviction on or about June 1, 2000, for possession of
8 a stolen vehicle, in No. C165933 in Clark County,
9 Nevada; and
10 (8) a conviction on or about June 28, 2000, for possession of
11 a controlled substance, in No. C166139 in Clark County,
12 Nevada.

13 (ECF No. 29-3; Exhibit 28. See also the exhibit filed manually with ECF No. 27.)

14 Petitioner contends, first, that the two 1990 Colorado convictions following upon 1989 and 1990
15 arrests could not be properly considered because the offenses would not constitute a felony in Nevada.
16 He relies upon the 1963 decision in *Carter v. State*, 79 Nev. 89, 378 P.2d 876 (1963),⁷ as support for
17 the proposition that for a conviction from another state to be considered, the acts in question must
18 constitute a felony under Nevada law. (ECF No. 7, at 4-5 & 15-16.)

19 Petitioner's reliance upon *Carter* is misplaced. It is true that – in 1963 – the then-pertinent
20 portion of the statute referred only to “any crime which under the laws of this State would amount to
21 a felony.” N.R.S. 207.010(2), as amended through 1961 Laws, ch. 267, § 1, at 446. However, in 1965
22 the then-pertinent portion of the statute was amended to include the current language referring to “any
23 crime which under the laws *of the situs of the crime* or of this State would amount to a felony.” N.R.S.
24 207.010(2), as amended by 1965 Laws, ch. 136, § 1, at 250. Manley's argument thus is 53 years too
25 late and is without merit. The two 1990 convictions were for felonies in Colorado. (See ECF No. 29-3,
26 at 17-22 & 55-64; Exhibit 28.) The two convictions thus properly could be considered as a basis for
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28 ⁷Petitioner cites the decision as a 1986 decision, but *Carter* was decided 55 years ago in 1963.

1 a habitual criminal adjudication under the then-applicable version of N.R.S. 207.010(1)(b) in connection
2 with No. C204662.

3 Second, petitioner contends that a 1986 Arizona conviction for attempted theft could not be
4 properly considered because the conviction instead was a misdemeanor conviction in Arizona. (ECF
5 No. 7, at 16.) This argument misses the mark because no Arizona conviction, of any description, was
6 included in the exhibit before this Court that was prepared in September 2004 prior to petitioner's
7 sentencing. (See ECF No. 29-3; Exhibit 28.)⁸

8 Third, petitioner contends that two Nevada convictions from 2000, one for possession of a
9 controlled substance and another for possession of a stolen vehicle, instead should have been considered
10 as only one conviction. He maintains that he entered into a plea agreement on April 18, 2000, that
11 consolidated the two cases together. He urges that the two convictions accordingly arose from the same
12 act, occurrence or transaction and therefore could be considered as only one conviction, relying upon
13 *Rezin v. State*, 95 Nev. 461, 596 P.2d 226 (1979). (ECF No. 7, at 4-5 & 16-17.)

14 Petitioner's reliance upon *Rezin* also is misplaced. In *Rezin*, the defendant previously had been
15 convicted of rape and robbery in a circumstance where the offenses factually grew out of the same act,
16 transaction or occurrence and were prosecuted in the same two-count indictment. 596 P.2d at 226.

17 In contrast, Manley: (1) was charged in No. C166139 with having committed the crime of
18 possession of a controlled substance on January 13, 2000; and (2) was charged in No. C165933 with
19 possession of a stolen vehicle at a different time on February 10, 2000. He signed separate guilty plea
20 agreements in each case, on different dates. While each guilty plea agreement referenced his agreement
21 to plead guilty also in the other case, he executed two separate plea agreements in the two separate cases
22 and entered two pleas separately in court in each respective case on different dates. He thereafter was
23 sentenced separately in the two cases on different dates, and a separate judgment of conviction was
24 entered separately in each respective case also on different dates. Nothing in the record reflects that the

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26 ⁸A 1986 Arizona conviction was referenced in the charging document. (ECF No. 18-2, at 5; Exhibit 1, at 4.)
27 The issue at this point, again, is whether petitioner can demonstrate actual factual innocence of the habitual criminal
28 adjudication. Any notice issues involved in the charging document referring to an Arizona conviction rather than
another conviction would go at best to procedural error and legal sufficiency, not actual factual innocence of the habitual
criminal enhancement.

1 offenses arose from the same act, transaction or occurrence – being charges for possession of a
2 controlled substance on January 13, 2000, and for possession of a stolen vehicle instead on February
3 10, 2000. Nor were the offenses ever charged together. Nor were the two separate cases ever
4 consolidated together. Rather, Manley simply entered pleas in two separate cases that had been pending
5 at the same time. (See ECF No. 29-3, at 30-40 & 92-102.) *Rezin* thus is inapposite.

6 It is subject to substantial question – even if a habeas petitioner otherwise *arguendo* may be able
7 to establish actual innocence of a habitual criminal adjudication – whether the foregoing arguments in
8 any sense present new reliable evidence of actual factual innocence of the habitual criminal adjudication
9 as opposed to arguments going merely to, at best, legal sufficiency.

10 In all events, however, petitioner had eight prior convictions in a situation where only three were
11 required for adjudication as a habitual criminal under N.R.S. 207.010(1)(b). Petitioner’s arguments,
12 even on their face, would not have reduced the number of properly-available convictions below the
13 minimum three prior convictions required. However, given that petitioner’s arguments do not establish
14 that even a single conviction of the eight convictions in fact was improper under the statute, it is
15 abundantly clear that he cannot establish actual factual innocence of the habitual criminal sentencing
16 enhancement.

17 Petitioner accordingly has failed to present a viable basis for overcoming the untimeliness of
18 the claims presented in the petition, which was filed nine years after the expiration of the federal
19 limitation period.⁹

20 IT THEREFORE IS ORDERED that the petition shall be DISMISSED with prejudice as
21 untimely.

22 IT FURTHER IS ORDERED that respondents’ motion (ECF No. 21) for an extension of time
23 is GRANTED *nunc pro tunc* in connection with the previously-filed response (ECF Nos. 23 & 24).

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25 ⁹Petitioner referred in his initial show-cause response to “requested discovery.” (ECF No. 10, at 5.) There are
26 no self-operative discovery requests in federal habeas proceedings, and a motion for leave to conduct discovery filed
27 earlier in this action was denied. (See ECF Nos. 5 & 6.) In all events, Manley maintained that the purported requested
28 discovery would prove his actual innocence of the habitual criminal adjudication, in connection with the arguments that
he made in this regard in his pleading and show-cause response. The filing of a copy of the convictions that were
available to the State at the time of his habitual criminal adjudication fully developed the federal record with respect to
the actual innocence arguments made by petitioner, which challenged whether certain convictions could be relied upon.

1 IT FURTHER IS ORDERED that petitioner's motion (ECF No. 25) to clarify and authenticate
2 supplemental exhibits is GRANTED IN PART and DENIED IN PART, with the motion being granted
3 to the extent to which the Court's February 9, 2018, order (ECF No. 26) directed additional filings and
4 otherwise is denied to any extent that the motion seeks further relief beyond that ordered.

5 IT FURTHER IS ORDERED that a certificate of appealability is DENIED, as reasonable jurists
6 would not find the district court's dismissal of the petition as untimely to be debatable or incorrect, for
7 the reasons discussed herein. At bottom, petitioner has not presented a viable argument for overcoming
8 the untimeliness of the federal petition. His actual-innocence argument as to the habitual criminal
9 adjudication in particular is without merit, as the record reflects that petitioner had eight prior qualifying
10 convictions at the relevant time where the governing statute required only three. Any procedural
11 irregularities in the habitual criminal proceeding notwithstanding, petitioner at this point must
12 demonstrate actual factual innocence, not merely technical legal insufficiency, to overcome the federal
13 time-bar.

14 The Clerk of Court shall enter final judgment accordingly, in favor of respondents and against
15 petitioner, dismissing this action with prejudice.

16 DATED this 29th day of March, 2018.

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20 LARRY R. HICKS
21 UNITED STATES DISTRICT JUDGE
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